

# Changes, Mitigation, and Exceptions Stakeholder Working Group Challenges Identified & Draft Ideas/Recommendations

May 17, 2022

## FOR DISCUSSION PURPOSES ONLY

Disclaimer: These are initial draft ideas/recommendations based on the Stakeholder Working Group's (SWG) identified issues/conversations and drafted by DNRC at the request of the SWG during the last meeting (4.26.22). These are high-level concepts for consideration by the SWG that will require further development and detail, and may require statute, rule and/or guidance modifications if the SWG determines that they want to develop further.

### **Permit Application Issues**

#### ***1. Permits- Correct and complete and preliminary determination***

Issue statement: clarity in permitting process

##### WG Ideas/draft recommendations:

- Recommendations: Each step in the process needs to be clearly delineated, stop having cross over. If there is a 2-part process, then it needs to be clearly delineated.

##### DNRC Ideas/draft recommendations:

- DNRC conduct public outreach/training on the different steps in the application process (this will be accomplished with the Stakeholder engagement Key Challenge)
- DNRC implement two-step process for all permits
  - First- DNRC determines water availability and depletions (for Ground Water applications) (120 Days)
    - o applicant has the opportunity to rebut (30 days)
  - Second- applicant finalizes permit information (30 days)
    - o DNRC determine if correct and complete (60 days)
  - Applicant can utilize the current one-step process.
- Updates/modifications to technical reports will be done via memo to file (sent to applicant)
- Update Water Division training to include clarification on what constitutes correct and complete and what constitutes substantive for criteria assessment; updated rulemaking may be required.

#### ***2. Black Hole & Waiver of Timelines***

Issue statement: Non-statutory timelines in the DNRC permitting process do not allow applications to be fully processed in a timely manner.

##### WG Ideas/draft recommendations:

- Set the number of days for DNRC
- Deficiency letter (60 days); tech report C&C (x days)
- Regular updates to applicants
- IF DNRC asks for a waiver, set a time limit on that. Department needs to track.

DNRC Ideas/draft recommendations:

- Black Hole: DNRC will have 90 days from the deadline of the deficiency response (120 days) to determine if the application is correct and complete or terminate.
- Waiver of the 120-day timeline for a preliminary determination:
  - DNRC will no longer request a waiver of statutory timelines.
  - Applicant requested waiver of statutory timelines will only be used when Applicant wants to provide additional information for the DNRC to consider in a decision.
    - Applicant will identify the timeframe needed (no more than 1 year) to provide this information.
    - DNRC has 90 days from the receipt of the additional information to issue the preliminary determination.
    - Any information provided after deadline will be treated as major amendment to application.

## **Permit and Change Application Issues**

### **3. Ground water analysis/data**

Issue statement: Stakeholders find that there is a battle of the experts, DNRC is not lending credibility to the applicant's assessment, and work is being duplicated. What is required to meet a preponderance of evidence seems inconsistent.

DNRC Ideas/draft recommendations:

- For closed basins, DNRC will provide the applicant with the option of DNRC conducting the aquifer test report and the depletion report in lieu of the applicant providing a hydrogeologic assessment. The applicant may conduct the hydrogeologic assessment and DNRC will only determine if the assessment is adequate and identify the deficiencies (if any) for the applicant to address.
- DNRC will update training of staff to include how to determine what constitutes preponderance of evidence.

### **4. Models/data/standards**

Issue statement: Stakeholders are concerned with the modeling used by DNRC, their accuracy relative to the modeling and measurement error, and their application to the real-world.

DNRC Ideas/draft recommendations:

- DNRC will evaluate the models used in decision making (return flow and depletion analyses), provide clarity and transparency on the assumptions and accuracy, evaluate appropriate timescales of use, and if other more simplified methods can be utilized to prove criteria for a permit or change application and is consistent with case law.

### **5. Terms and Conditions and granting with modifications**

Issue statement: Stakeholders would like to see DNRC work with the applicant to grant in modified form rather than deny, additional enforcement, and measurement submitted to the department.

DNRC Ideas/draft recommendations:

- DNRC utilizes grant in modified form rather than detail. In the past five years, DNRC has denied 2 applications and granted in modified form 7 applications. In this same time, DNRC has issued approximately 500 permits & changes.
- Enforcement will be addressed by the Final Decree Transition Stakeholder Working Group.
- The working group can make the recommendation to require all water users to measure use.

## 6. Verification

New topic added: New appropriations are rarely, if ever, verified to determine if the best estimates submitted with applications are what is actually used on the ground. We are starting to see the consequences of this with change applications coming in to increase flow rate from a new well to “get to our permitted volume”.

### DNRC Ideas/draft recommendations:

- None developed yet.

## 7. Rules

Issue statement: clarity is needed for why rules are in existence, if they need to be updated, and how they are applied. Need to focus on streamlining and flexibility.

### DNRC Ideas/draft recommendations:

- These issues and the additional stakeholder comments related to rules will be addressed as part of Key Challenge (KC) #2. DNRC will have a process for proposed rules to be evaluated by stakeholders prior to going to rulemaking. DNRC will use comments from KC #3 to guide its review of rules under KC #2.

## 8. Objections

Issue statement: Stakeholders identified the challenge of DNRC not supporting their analyses during the objection phase and the process is not understandable to the objectors. Additionally, evaluate the location of the hearing's unit.

### DNRC Ideas/draft recommendations:

- DNRC will evaluate what other agencies and other states do for their permitting and objection processes; from there develop recommendations for the working group's consideration.

## **Change Application Issues**

### 9. Adverse effect

Issue statement: It is unclear how the Department determines adverse effect for permits and changes. Stakeholders want a clear definition, based on case law, applicable to open and closed basins. DNRC analysis are overly technical, not necessarily accurate, and may not be necessary to evaluate adverse effect.

### WG Ideas/draft recommendations:

- Look at local response, and does the change impact? What is happening in the area of influence, localized analysis, rather than paper analysis.
- Need to get to universal measurement and recordkeeping. In Colorado, these types of MT disputes were rare, because people monitor and there are records.
  - This could help DNRC get away from focusing on theoretical/potential adverse effect
- Need detailing of water rights, otherwise what is available.
- Remove a physical and legal availability analysis/comparison from the adverse effect criteria assessment
  - Tried to address this legislatively with the waiver of adverse effect, but water users have concerns about waiving ability to address issues in the future

- DNRC focus has been on potential for adverse effect, not actual findings of certainty of adverse effect

DNRC Ideas/draft recommendations:

- Define adverse effect in rule or in guidance. Adverse Effect: Adverse effect in the context of the permitting process means an applicant does not prove that they can properly regulate their diversion of water so that:
  - For permits, during times of water shortage, the rights of prior appropriators will be satisfied; and
  - for changes, the historical use of their water right(s) will not be exceeded under the changed conditions or interfere with junior appropriators right to maintain conditions on the source."
- To determine if existing water users can still reasonably exercise their rights for surface water and groundwater changes, DNRC will primarily review historical use compared to proposed use (diverted flow & volume, consumed volume) to ensure no increase in use occurs. Specifically:
  - Ground Water changes-
    - Where there is not a change in POD, only a comparison of historical use to the new use will be used to determine adverse effect.
    - With a POD change- In addition to a comparison of historical use to new use, DNRC would conduct a depletion analysis (TU decision, 36.12.1903) to identify any new depleted sources.
  - Surface Water changes-
    - Only a comparison of historical use to the new use will be used to determine adverse effect.
- DNRC will review case law on return flows and make recommendations on reducing complexity of the return flow analyses.
- The Stakeholder Working Group can recommend a legislative proposal to require all water users to measure certain use.

## **10. Historical use analysis**

Issue statement: Stakeholders would like clarity on what data are needed to meet “preponderance of evidence,” clarity on what information can be provided to meet these criteria, transparency on what information provided by the applicant is or is not used and are challenged by the fact that pre-1973 information is largely unobtainable.

DNRC Ideas/draft recommendations:

- Simplify and clarify change application questions to focus on historical diverted flow, rate, and volume, and consumed volume.
- Proving historical use will not be exclusive to pre-1973 data (i.e., allow modern measurements to help demonstrate pre-1973 historic use). DNRC will still require a review of pre-1973 water use information, but not to the level of detail currently required.
- DNRC implement two-step process for a change application (form 606)
  - First- DNRC review of historical use of the water right (120 days)
    - applicant has the opportunity to rebut (30 days).
  - Second- applicant applies the historic use information to the change proposal (30 days)
    - DNRC determine if correct and complete (60 days).

- After correct and complete, DNRC has 120 days to complete Preliminary Determination (same as existing process)
  - Applicant can choose not to use the 2-step process.
- DNRC implement two-step process for a Closed Basin Combined Application (forms 600 and 606):
  - First- DNRC determines the mitigation requirement and how much mitigation water is available for the water rights in the proposed change (120 Days);
    - applicant has the opportunity to rebut (30 days).
  - Second- applicant finalizes permit and change information (30 days);
    - DNRC determine if correct and complete (60 days).
  - Applicant can choose not to use the 2-step process.
- The Stakeholder Working Group can recommend a legislative proposal to require all water users to measure certain use.

#### **11. Changes- changes on water rights were accepted before statement of claims were filed**

Issue Statement- changes on water rights were accepted before statement of claims were filed on the water right. Information on the change is different than what is on the claim.

##### DNRC Ideas/draft recommendations:

- A new change needs to be filed, there is no mechanism to add water rights to a previously authorized change. If not included in the original change application – these additional water rights would not be evaluated, and public notice would not have been given.

### **Other issues**

#### **12. Complaint process**

##### Discussion of issues:

- It is not working, nothing is happening, how do we fix it?

##### DNRC Ideas/draft recommendations:

- This will be addressed by the Final Decree Transition Stakeholder Working Group.

#### **13. General Education**

##### Discussion of issues:

- A lot of people just don't know that they need a change, don't understand (education and outreach Key Challenge)

##### DNRC Ideas/draft recommendations:

- This will be addressed in Stakeholder Engagement Key Challenge.